SEAN O'CASEY PATTERSON

v.

CHAN HOONG POH & ORS

HIGH COURT MALAYA, KUALA LUMPUR
HINSHAWATI SHARIFF JC
[ORIGINATING SUMMONS NO: S8-24-2813-05]
18 SEPTEMBER 2008

FAMILY LAW: *Children - Adoption - Muslims - Whether Registration of Adoptions Act 1952 applicable to Muslims - Adoption Act 1952 to be read and interpreted independently of Registration of Adoptions Act 1952 - Nothing to bar application of Registration of Adoptions Act 1952 to Muslims*

FAMILY LAW: *Children - Adoption - Adoption under Registration of Adoptions Act 1952 - Whether requirements for adoption satisfied - Whether consent of natural parents obtained - Wrong person named as father in birth certificate of child - Registrar can rely on information regarding parents contained in birth certificate of child - Contents of statutory declaration falsified - No duty on Registrar to ascertain whether statutory declaration genuinely obtained - Whether child was maintained and educated by adopters before adoption - Whether requirements of s. 6 of Registration of Adoptions Act 1952 satisfied*

The plaintiff, an American citizen, claimed that he had married the first defendant in Las Vegas. Thereafter the first defendant alone returned to Malaysia and gave birth to a son Jordan Ter Wei and now known as Eusof Jordan Nik Ahmad ("Jordan") in Kuala Lumpur. Between 2001 to 2004, the plaintiff had made numerous trips to Malaysia to visit the first defendant and Jordan. The plaintiff also constantly sent money for the first defendant and Jordan. Subsequently the plaintiff discovered that one Engelbertus Antonious Marius Van Hoek ("Bart") had been named as the father of Jordan in the latter's birth certificate. However DNA test proved the plaintiff to be Jordan's biological father. When plaintiff and Bart went to the fourth defendant's office to rectify Jordan's birth certificate it was discovered that Jordan had been adopted by the first defendant's sister and her husband, the second and third defendants respectively (both Muslims). The plaintiff hence filed this application. Enclosure 1 was filed by the plaintiff whilst encl. 29 was filed by the first defendant. The common factor in

both the applications was the challenge to the purported adoption of Jordan by the second and third defendants. The first defendant claimed that she had never agreed for Jordan to be adopted by the second and third defendants. The second defendant averred that she had no knowledge of the plaintiff's marriage to the first defendant and that she had believed that Bart was Jordan's father. The second defendant also deposed that the first defendant had left Jordan in the second and third defendants' care and had consented to their adoption of Jordan. The plaintiff, *inter alia*, prayed for declarations that the plaintiff was the biological father of Jordan (prayer 1) and that the register be amended/rectified so that the plaintiff be named as the father of Jordan (prayer 2). Both the plaintiff and first defendant also sought for a declaration that the said adoption was null and void and that the adoption be set aside, *inter alia*, on the grounds that: (a) the Registration of Adoptions Act 1952 ('Act 253') is not applicable to Muslims; (b) lack of consent by biological parents; and (c) conditions under s. 6 of Act 253 had not been fulfilled.

Held (allowing prayer 1 and prayer 2 and dismissing the rest of the prayers):

(1) It was an undisputed fact that the plaintiff was Jordan's biological father. (para 18)

(2) Act 253 and Adoption Act 1952 ('Act 257') should be read and interpreted quite independently of one another. A different approach should also be taken on the question of the applicability of Act 253 to Muslims. Whilst Act 257 is very clear in its non-applicability to Muslims by virtue of s. 3 of the Act, the same is not found in Act 253. In the absence of an equivalent provision to that of s. 3 in Act 257, and the fact that the operation of the two Acts is quite independent of one another, there is nothing to bar the application of Act 253 to persons professing the religion of Islam. (paras 28 & 29)

(3) It was very difficult to accept the first defendant as a witness of truth, especially in the light of other evidence as to her conduct. It was therefore very dangerous to accept her averments that she had not given her consent to the adoption. (para 34)

(4) In the Surat Keizinan Pengangkatan (Akuan Berkanun JPN AA07), it was stated that Bart, being the father of the child, could not be contacted. It was based on this information that the fourth and fifth defendants had processed and approved the application for registration of adoption. (para 35)

(5) Jordan had been in the custody, had been brought up, maintained and educated by the second and third defendants and in that respect, they had fulfilled the requirements of s. 6. (para 46)

(6) The registrar, at the time of the application was duty bound to accept the statutory declaration and if the contents of that statutory declaration were later found to be falsified, the registrar's remedy was to bring an action for giving false information. It is not the duty of the registrar to ascertain whether the statutory declaration had been genuinely obtained. (paras 47 & 48)

Case(s) referred to:

Abdul Shaik Md Ibrahim & Anor v. Hussein Ibrahim & Ors [1999] 3 CLJ 539 HC ***(refd)***

Low Pek Nai v. Koh Chye Guan [1995] 2 CLJ 110 HC ***(refd)***

Re Balasingam & Paravathy, Infants; Kannamah v. Palani [1970] 1 LNS 134 HC ***(refd)***

Re Loh Toh Met, deceased; Kong Lai Fong & Ors [1961] 1 LNS 109 HC ***(refd)***

Sinnakaruppi Periakaruppan v. Bathumalai Krishnan [2001] 2 CLJ 435 HC ***(refd)***

Legislation referred to:

Adoption Act 1952, ss. 3, 8, 25
Registration of Adoptions Act 1952, ss. 6, 8(1)
Law Reform (Marriage and Divorce) Act 1976, s. 57

For the plaintiff - YN Foo; M/s YN Foo & Partners
For the 1st defendant - Sharmini Jayan; M/s Jayan & Assoc
For the 2nd & 3rd defendants - SS Ravichandren (CY Ng with him); M/s Seah Balan Ravi & Co
For the 4th & 5th defendants - Zawiyah Saad (Zarifah Zulghaffar with her); AG's Chambers

Reported by Amutha Suppayah

A

JUDGMENT

Hinshawati Shariff JC:

[1] By consent of the parties, encl. 1 and encl. 29 were heard together as they emanate from the set of facts. Enclosure 1 is an application filed by the plaintiff whilst encl. 29 was filed by the first defendant. The common factor in both the applications is the challenge to the purported adoption of a child, whose name was Jordan Ter Wei and now known as Eusof Jordan Nik Ahmad, by the second and third defendants.

[2] The facts of this case as gleaned from the affidavit of the plaintiff (encl. 2), shows that the plaintiff is an American citizen and is currently residing in Long Beach, California, USA. He holds the posts of the President and the Chief Executive Officer of his own company called 'Pacific One Media Corporation' and is also the Director of 'Electroserv USA, Inc.'.

[3] The plaintiff deposed that he first met the first defendant in December 1998, in Kuala Lumpur. They started dating and in March 1999, the plaintiff proposed marriage to the first defendant. Sometime in early April 1999, the first defendant travelled to the United States to meet and get acquainted with the plaintiff's family and subsequently on 10 April 1999, the plaintiff and the first defendant were married at the Little Church of the West, Wedding Chapel, Las Vegas. Thereafter due to work commitments, the plaintiff stayed behind and the first defendant alone returned to Malaysia.

[4] There were intervening events which occurred between the time the first defendant left for Malaysia until March 2000 as deposed by the plaintiff in his affidavit but at this point of time, suffice for me to say that the first defendant had, on 21 March, 2000, given birth to a baby boy whom she named Jordan Ter Wei ("Jordan"), at the Pantai Hospital, Kuala Lumpur. The plaintiff came to Malaysia in April 2000 for Jordan's christening ceremony. Photographs of the said ceremony were shown and exhibited as "SP12" to encl. 2.

[5] For the period between 2001 to 2004, according to the plaintiff, he made numerous trips to Malaysia to visit the first defendant and Jordan. In all he made nine trips. Extracts from the relevant pages in his passport were shown and exhibited as

"SP19" to encl. 2. According to the plaintiff, it was initially planned that the first defendant and Jordan would come to join him in the United States but after some time it became apparent to him that the first defendant was reluctant to return to the United States and set up home with him and their son as they had discussed and agreed to earlier. Despite not keeping to this plan, the plaintiff said the first defendant had always made sure that the plaintiff would give or send money for herself and Jordan.

[6] Then, somewhere in September 2004 the plaintiff said he was compelled to seek the services of Messrs YN Foo & Partners. This he did with the intention of protecting his as well as Jordan's interests and also because he wanted a more structured arrangement for payment of maintenance for Jordan. The plaintiff also said that by this time he had become more convinced that Jordan's birth certificate had been falsified. The first defendant, on her part, engaged the services of Messrs P.L. Tan & Mah. Correspondences and discussions ensued between the two firms of solicitors and on 15 March 2005, the plaintiff was allowed to meet Jordan, the first time he saw Jordan after their last meeting in February 2002 in Manila. After that meeting the plaintiff requested to see Jordan again but the first defendant through her solicitors refused the plaintiff's request demanding that the issue of the financial arrangements be addressed first. Negotiations between them, however, broke down as the first defendant had allegedly refused to let the plaintiff know of Jordan's whereabouts.

[7] From the same affidavit, the court was also informed that the plaintiff had by sheer coincidence discovered that his solicitors had once represented a certain Engelbertus Antonious Marius Van Hoek ("Bart") in another custody case. Again here I will not go into the details of that discovery except to say that it was then that the plaintiff learnt that Bart had been named as the father of Jordan in the latter's birth certificate. Following that, the plaintiff decided to do a profiling test, the first in 2004 and a second test done in June 2005. A copy of the DNA lest results dated 12 November 2004 was shown and exhibited as "SP32" to encl. 2.

[8] The plaintiff and Bart had also gone to the office of the fourth defendant at Putrajaya with the intention of rectifying Jordan's birth certificate. The plaintiff again made another discovery in that he was told by the fourth defendant that Jordan

had been adopted by the first defendant's sister and her husband, the second and third defendants respectively. The adoption certificate dated 18 February 2004 was shown and exhibited as "SP33" to encl. 2.

[9] The plaintiff hence filed this application.

[10] I now move to the affidavits of the first, second, third, fourth and fifth defendants respectively. I shall first start with the affidavit of the first defendant (encl. 25), The first defendant denied that she had lawfully married the plaintiff in Las Vegas, United States as alleged by the plaintiff. She averred that it was her belief that the 'ceremony' in Las Vegas was only "to exchange a pledge of our love in an informal setting as a prelude to our formal wedding some time in the future in Malaysia". The first defendant further deposed that she had planned to deliver the baby in the United States but decided against it as she was having a difficult pregnancy and travelling would, she thought, jeopardize the baby. In answer to the allegation on the intended move to the United States, the first defendant said she was not able to do so because at the time, she had a custody dispute with Bart over William, her son with Bart. On the fact that Bart had been registered as the father of Jordan, the first defendant deposed that it was done on the request of Bart as the latter thought that by so doing, she would agree to marry him. She said she had agreed to the request because she was in no position to fight Bart in view of the custody suit. She, however, admitted that she did not inform the plaintiff of this. She also admitted that the plaintiff, and not Bart, is the father of Jordan.

[11] With regard to the adoption, the first defendant deposed that she had never given up nor agreed for Jordan to be adopted by the second and third defendants. She claimed that the first time she knew about the said adoption was when she received a call from an officer of the fifth defendant notifying her that the plaintiff was attempting to stop Jordan's adoption.

[12] The second defendant is the elder sister of the first defendant. She is married to the third defendant but they have no children of their own. In her affidavit (encl. 7), apart from similar averments as that of the third defendant's, the second defendant averred that she had no knowledge of the plaintiff's marriage to the first defendant. At that time, the second defendant said, the

first defendant was living with Bart and when the first defendant was pregnant with Jordan, she assumed the baby was Bart's. She said the first defendant had never told her of the relationship with the plaintiff. Also, the second defendant said she believed that Bart was Jordan's farther because in Jordan's birth certificate, Bart had been named as the father.

[13] In her second affidavit (encl. 26), the second defendant had deposed that at the time the first defendant was having problems with Bart, the former had told her that Bart had agreed that he would care for Jordan.

[14] The affidavit of the third defendant (encl. 6) revealed that sometime in 2000, his wife, the second defendant, brought home Jordan, allegedly on Bart's request. The third defendant said at that time he and his wife only knew that Bart is the husband of the first defendant and the father of Jordan. Jordan, it was said, stayed with them for two days, after which his mother, the first defendant, came to take him home. The first defendant returned to the third defendant's house a week later together with Jordan and the maid, Sumartun and it was alleged that the first defendant had requested the third and second defendants to provide temporary care and shelter to Jordan and Sumartun. The third defendant admitted that at the material time it was not their intention to adopt Jordan but had only wanted to help the first defendant.

[15] During these times when Jordan was in the care of the third and second defendants, the third defendant said that the first defendant would from time to time come to visit Jordan and would occasionally take Jordan out of the house, accompanied by the second defendant. After a period of time, the third defendant said, on the request of the first defendant, he and the second defendant then adopted Jordan, which adoption was approved and registered on 18 February 2004. Daftar Anak Angkat No. 06437 was shown and exhibited as "NA1" to encl. 6.

[16] As for the affidavits of the fourth and fifth defendants, it was in the deposition of Encik Wan Ahmad Dahlan bin Haji Abdul Aziz, the Pengarah Bahagian Kelahiran, Kematian, Anak Angkat, Jabatan Pendaftaran Negara ("JPN") that on 15 Jun 2005, the plaintiff with Bart had met one Encik Nik Hassan Fauzi bin Abdullah and Encik Mohd Yusri bin Yusof at JPN, Putrajaya for

A the purpose of rectifying the birth certificate (No: AQ 53834) in respect of a child known as Jordan Ter Wei Van Hoek. The plaintiff, it was said, had applied for Bart's name; which had been stated as the natural father of Jordan be removed and substituted with his own name. In the process, it was then discovered that
B Jordan had been adopted by the second and third defendants.

[17] There were several issues that have been raised in the applications. For convenience I shall first delve into the issues that have been raised only in the plaintiff's application.

C

[18] In prayer 1 of encl. 1, the plaintiff had asked for "a declaration that the plaintiff Sean O'Casey Patterson is the biological father of the child previously named Jordan Ter Wei and now named Eusof Jordan Nik Ahmad." It was the contention of learned counsel for the plaintiff that it is an undisputed fact that
D the plaintiff is the biological father of Jordan. I had accepted this contention of the learned counsel for the various reasons that were cited in support thereof. The first of those reasons is exh. "SP32" which is the result of the DNA test done by the
E plaintiff. Secondly, the first defendant, the biological mother of Jordan, had also admitted that the plaintiff is Jordan's biological father. Bart Van Hoek, whose name purportedly appeared in Jordan's birth certificate as the latter's natural father has also confirmed by way of a statutory declaration that he is not
F Jordan's biological father. It is also in the evidence that he had accompanied the plaintiff to the National Registration Office at Putrajaya to make the necessary amendments to Jordan's birth certificate so that his name can be removed and substituted with that of the plaintiff so as to reflect the plaintiff as Jordan's true
G father. The other interested parties namely the second and third defendants also did not dispute this fact although they said they had no knowledge of it prior to the filing of the originating summons.

[19] On that evidence, I did not have any difficulty in holding that
H the plaintiff is the biological father of the child previously named Jordan Ter Wei and now named Eusof Jordan Nik Ahmad and accordingly granted the declaration prayed for.

I

[20] I also then allowed prayer 2 of encl. 1 "that the fourth and/or fifth defendant amend/rectify the register so that the plaintiff, Sean O'Casey Patterson be named as the father of the child previously named Jordan Ter Wei and now named Eusof Jordan Nik Ahmad in the Birth Certificate No. 000321-14-0363/AQ 53834.". A B

[21] The next issue and which issue is common to both the plaintiff and the first defendant concerns the purported adoption of Jordan by the second and third defendants. Both the plaintiff and the first defendant in their applications (prayers (d), (e) and (f) in encl. 1) and (prayers (1), (2), (3) and (4) in encl. 29) had sought for a declaration that the said adoption is null and void and that the adoption and/or registration of adoption be set aside. C

[22] It was the contention of learned counsel for the plaintiff that the adoption of Jordan by the second and third defendants pursuant to the Registration of Adoptions 1952 (Act 253), ought to be declared null and void and set aside on the following grounds: D

(i) The Act is not applicable to Muslims; E

(ii) Lack of consent by biological parents;

(iii) Conditions under s. 6 of the Act have not been fulfilled/satisfied; and F

(iv) Registration under the Registration of Adoptions Act unlike the Adoption Act does not confer on the child full status of a child born to the adopters in lawful wedlock.

[23] Learned counsel for the first defendant, however, only relied on grounds (ii), (iii) and (iv). G

In regard to the first ground, learned counsel for the plaintiff relied on the High Court case of *Abdul Shaik Md. Ibrahim & Anor v. Hussein Ibrahim & Anor* [1999] 3 CLJ 539, wherein it was held that the adoption of a child by a Muslim couple pursuant to Act 253 was void. The court referred to s. 3 in Act 257 which excludes Muslims from the operation of the said Act and held that Act 253 should be read together with Act 257, otherwise the purpose for excluding Muslims from the operation of Act 257, would be defeated. H I

[24] On the face of this decision, learned counsel argued for the plaintiff that Act 253 does not apply to the second and third defendants because they are Muslims and consequently, the purported registration of adoption of Jordan by the fourth and fifth defendants is, therefore, null and void.

[25] In determining this issue, an examination of the contents of Act 253 and that of the Adoption Act 1952 (Act 257) therefore becomes necessary, The preambles of both Acts do not offer much assistance in that Act 253 merely says that it is "An Act to provide for the registration of adoptions" whilst that of Act 257 states that it is "an Act to provide for the adoption of children." By merely looking at the titles of the Acts, it would not be difficult to come to a misleading conclusion that one can apply for an adoption order under Act 257 and then register the adoption order under Act 253. However, a reading of the relevant sections in the Acts will clearly show that it is not so. To start with, s. 6 of Act 253 provides as follows:

6. Registration of *de facto* adoptions

(1) Where at the date when application for registration is made any child under the age of eighteen years who has never been married is in the custody of, and is being brought up, maintained and educated by any person, or by two spouses jointly, as his, her or their own child under any *de facto* adoption, and has for a period of not less than two years continuously and immediately before the date of such application been in such custody and has been so brought up, maintained and educated, the registrar may, upon the application, in the form in the first schedule, of such person or spouses, register the adoption if:

(a) such person or spouses and the child shall appear before the registrar and shall produce to the registrar such evidence either oral or documentary as may satisfy the registrar that such adoption took place;

(b) the parents or one of the parents, or, if both the parents are dead or if neither of the parents is within West Malaysia, any guardian of the child shall appear before the Registrar and express consent to the adoption:

Provided that if the Registrar is satisfied that in all the circumstances of the case it is just and equitable and for the welfare of the child he may dispense with the

consent of any parent or custodian of the child or with the appearance of any parent or custodian who shall have signified his consent by statutory declaration; and

(c) the prescribed fees are paid.

(2) The Registrar shall register an adoption by entering the particulars thereof in the register.

It is therefore apparent that under Act 253, the power to register an adoption is vested with the Registrar of Adoption. In contrast, the power to make adoption orders under Act 257 is the court having jurisdiction to do so under the said Act. The equivalent section to that of s. 6 in Act 253 would be s. 8. It reads as follows:

8. Provision as to existing *de facto* adoptions

Where at the date of the commencement of this Act any child is in the custody of, and is being brought up, maintained and educated by any person or by two spouses jointly as his, her or their own child under any *de facto* adoption, and has for a period of not less than two years before such commencement been in such custody, and has been so brought up, maintained and educated, the Court may, upon the application of such person or spouses and notwithstanding that the applicant is a male and the child a female, make an adoption order authorizing him, her or them to adopt the child without requiring the consent of any parent or guardian of the child to be obtained, upon being satisfied that in all the circumstances of the case it is just and equitable and for the welfare of the child that no such consent should be required and that an adoption order should be made.

[26] It is very clear, therefore, that a comparison between s. 6 of Act 253 and s. 8 of Act 257 seems to show that one could effect an adoption either by way of 'registration' under Act 253 or by way of a court order under Act 257. The reason for choosing one over the other is not clear, although one could argue that there is more strength in an order of court. This is more so because Act 257 very clearly and specifically spelt out that "Upon an adoption order being made, all rights, duties, guardian or guardians of the adopted child; in relation to the future custody, maintenance and education of the adopted child, including all rights to appoint a guardian or to consent or give

notice of dissent to marriage shall be extinguished, and all such rights, duties, obligations and liabilities shall rest in and be exercisable by and enforceable against the adopter as though the adopted child was a child born to the adopter in lawful wedlock ...". The same provision is not found in Act 253.

[27] Also, under Act 253, the registrar is requested to keep a register which is prescribed in the Second Schedule in the same Act. Act 257 by way of s. 25 provides for what is known as the "Adopted Children Register".

[28] In view of these differences in the two Acts, in my opinion, there is a basis to support the proposition that Act 253 and Act 257 should be read and interpreted quite independently of one another. My view is further fortified by the provision of s. 10 of Act 253 which states that 'The registrar shall not register any adoption in respect of any child who has been the subject of an adoption order made in accordance with the Adoption Act 1952 (Act 257)". It seems to me, therefore, that this provision clearly separates the operation of Act 253 from that of Act 257.

[29] Having said that, I am also of the view that a different approach be taken on the question of the applicability of Act 253 to Muslims. Whilst Act 257 is very clear in its non-applicability to Muslims by virtue of s. 3 of the Act, the same is not found in Act 253. Act 253 is silent on this. In my view, therefore, in the absence of an equivalent provision to that of s. 3 in Act 257, and the fact that the operation of the two Acts is quite independent of one another, there is nothing to bar the application of Act 253 to persons professing the religion of Islam. It was, in fact, brought to my attention by the learned Federal Counsel for the fourth and the fifth defendants of a passage in *Halsbury's Laws of Malaysia* (Vol. 8) MLJ 58 wherein it was quoted:

> It should be noted than the Registration of Adoption Act 1952 was intended for the use of Muslims. This is because Islam does not recognize adoption and in order to legitimate such customary practice, the adoption could be registered under this Act so as to safeguard the right to custody of the adopted parents.

[30] This statement is not without merits. Without proper documentation, how else then can a Muslim couple who has taken upon themselves the care of a child go about doing simple,

routine things such as enrolling the said child into a school, or for the purpose of obtaining identify cards or even applying for passports?

[31] Further, the significant difference in the legal status as conferred by Act 253 and Act 257 on an adopted child had been discussed in the case of *Re Loh Toh Met* [1961] 1 LNS 109, whereby the court had held that the adopted child whose adoption was registered under the Registration of Adoptions Ordinance 1962, had no succession rights. If this decision is taken to be correct, then in my opinion, the issue of the effect of adoption under Act 253 being repugnant to Islamic law does not arise.

[32] I, therefore, hold that the contention of learned counsel for the plaintiff on this ground is without merits.

[33] The next common ground which the plaintiff and the first defendant's case rest on concerns the requirement for consent under s. 6 of Act 253. It was argued for the first defendant that the facts and the evidence shows that the first defendant did not give up Jordan for adoption and she had denied signing the statutory declaration for consent to adoption.

[34] Having perused through the evidence of the first defendant, I have to say that I had found little or no weight to be attached to it. Truthfully I find it very difficult to accept the first defendant as a witness of truth, especially in the light of other evidence as to her conduct. In particular there is the evidence that she had not informed the plaintiff of her still subsisting marriage to John Kung Sie Kiat when they were married in Las Vegas. The plaintiff also told the story of how he flew to London on 23 March 2000 to surprise the first defendant because the first defendant had called to inform him that she had given birth to their son in London when in fact, she had been in Kuala Lumpur the whole time. Then there is also the unchallenged evidence that whilst continuing that 'marriage' with the plaintiff, the first defendant was also living with Bart in Kuala Lumpur together with William and Jordan. Last but not least there is also the issue of the falsification of information in Jordan's birth certificate which the first defendant had admitted doing. Taking these facts into account I am of the view that it would be very dangerous for me to accept her averments that she had not given her consent to the adoption.

What reason can the second and the third defendants have to say that the first defendant had given her consent when in fact she has not? The plaintiff, in fact, in his affidavit had also alleged that the first defendant had conspired with the second and the third defendants with the object of depriving his rights, if any, over Jordan. From what the plaintiff himself had averred in his affidavit, it appears that the plaintiff also believed that the first defendant had freely consented to the adoption. The first defendant, in her affidavit, merely denied that she had signed the statutory declaration signifying consent. But she did not in the first place explain how her signature got on to the statutory declaration except to say that the handwriting in that form resembles that of the second defendant's. Based on these findings, I find that the first defendant's averments that she, in fact, did not give her consent to the adoption of Jordan by the second and third defendants very difficult to believe.

[35] Further, it was also submitted that the plaintiff as the natural father, was never asked for his consent. In this respect, learned counsel for the plaintiff drew my attention to the undisputed fact that Bart Van Hoek had been named as the father of Jordan (in the birth certificate) as well as in the Permohonan Pendaftaran Pengangkatan (exh. "WAD2" to encl. 16). It is also a fact not disputed that in the Surat Keizinan Pengakatan (Akuan Berkanun JPN AA07) (exh. "WAD4" to encl. 2), it is stated that Bart Van Hoek, being the father of the child, could not be contacted. It was based on this information that the fourth and fifth defendants had processed and approved the application for registration of adoption.

[36] On the issue of consent of the plaintiff, I agree with learned counsel had the plaintiff been domiciled in Malaysia, he could have availed himself of s. 57 of the Law Reform (Marriage and Divorce) Act 1976, rendering the child of an invalid marriage as the legitimate child of his parents. In this case, however, I am unable to agree that Jordan ought to be treated as the legitimate child of the plaintiff and the first defendant. The plaintiff is not domiciled in Malaysia and thus the Act does not apply to him. It is in the evidence that when the first defendant 'married' the plaintiff, she was still married to one John Kung Sie Kiat and her divorce with John Kung Sie Kiat only became final on 14 April 2003, some five years after the 'marriage' between the plaintiff and the first

defendant. In my view, the 'marriage' between the plaintiff and the first defendant remains an invalid marriage for want of capacity to marry on the part of the first defendant, irrespective of the fact that it was concealed from the plaintiff.

[37] In the alternative, I was urged by learned counsel to accept that the Guardianship of Infants Act 1961 ("GIA") applies to illegitimate children and following the cases of *Low Pek Ngai v. Koh Chye Guan* [1995] 2 CLJ 110 and *Sinnakaruppi Periakaruppan v. Batumalai Krishnan* [2001] 2 CLJ 435 HC, it was submitted that the plaintiff as Jordan's biological father has the same rights and authority on legal guardianship as that of the first defendant.

[38] With respect to learned counsel, again, I am unable to agree to this argument. In the case of *Sinnakaruppi*, the learned judge had so found that the GIA now applies to illegitimate children in view of the substitution of the former s. 5 by a new s. 5 providing for equality of parental rights. The new s. 5 now reads as follows:

> 5 Equality of parental rights
>
> (1) In relation to the custody and upbringing of an infant or the administration of any property belonging to or held in trust for an infant or the application of the income of any such property, a mother shall have the same rights and authority as the law allows to a father, and the rights and authority of mother and father shall be equal.
>
> (2) The mother of an infant shall have the like powers of applying to the Court in respect of any matter affecting the infant as are possessed by the father.

[39] In contrast, the former s. 5 was stated as thus:

> 5. Subject to the provisions of section 10 the father of an infant shall be the guardian of the infant's person and property:
>
> Provided that the Court or a Judge may make such order as it or he thinks fit regarding the custody of the infant, and the right of access thereto of either parent, and may vary or discharge such order at any time on the application of either parent.

[40] With respect to learned counsel, I am unable to agree that the amendment referred to above has somewhat changed the proposition of the law in respect of the applicability of the GIA on illegitimate children, As can be seen, the words used are still

'mother' and 'father' and echoing the words of Raja Azlan Shah J (as His Royal Highness then was) in the case as *Re Balasingam & Anor* [1970] 1 LNS 134 that:

> .... Since none of the words 'father', 'mother' or 'infant' can be construed to mean illegitimate in fact or the *de facto* parents of illegitimate children, it must be concluded that the Act does not apply to illegitimate children.

[41] In the circumstances, it is also my view that the plaintiff cannot avail himself of the parental right given under s. 5 of the GIA for the reasons which I have just given.

[42] The next common ground relied on by the plaintiff and the first defendant is with regard to the requirements relating to the custody, maintenance and education of the adopted child. Learned counsel for the plaintiff submitted that the conditions in s. 6 had not been fulfilled and the registrar should not have exercised his discretion to register the said adoption. Section 6 also provides that the would be adoptive parents do undertake that responsibility for a period of not less than two years continuously and immediately before the date of such application.

[43] In this regard, I had considered the depositions of the plaintiff, the first defendant and also the second and third defendants. It is in the deposition of the plaintiff that he had right from the birth of Jordan, provided for his son. He had averred that he had never failed to make financial provisions for the first defendant as well as for Jordan and he also said whenever and wherever he could, he did visit Jordan. On the evidence, I find that the plaintiff had, in fact made financial provisions for the first defendant and Jordan. I am, however, also mindful of the fact that the money and other benefits were given to the first defendant directly. The question that comes to mind is whether this money and benefits had been used towards the care and maintenance of Jordan? This is because the plaintiff himself has described the first defendant "as a pathological liar" who had weaved, and to borrow the words of the plaintiff" ... a massive web of lies deception decert, fraud and subterfuge ...". The plaintiff had meticulously laid out at paras. 73 to 76 of his affidavit (encl. 2), descriptions of the first defendant's conduct, which were neither challenged nor rebutted. Against that background, I have no hesitation in concluding that although the plaintiff had done all he could to

provide for the well-being of Jordan, it is very unlikely that the financial provisions that he had made had been used for Jordan's benefit. I have all reasons to believe that the first defendant had used the money given by the plaintiff, on herself and she was in all probability too happy that Jordan was being cared by her sister, the second defendant and the husband. The second and third defendants had deposed that it was not their intention at first to adopt Jordan. They had wanted only to help the first defendant because the latter is the sister of the second defendant and Jordan, their nephew. They had also deposed in their affidavits that over a period of time they became attached to Jordan, more so because the first defendant was seeing less and less of Jordan. They also became fond of Jordan, and not surprisingly, because they do not have children of their own. There is also the undisputed evidence that both the second and third defendants have good financial standing and as such, I do not see any reason to disbelieve that the second and third defendants had maintained Jordan since the time he was in their care.

[44] Also on the question of maintenance, again I find this allegation of the first defendant not substantiated with evidence. It was said that the first defendant never thought that it was necessary to keep account of the sums of money given to the second defendant because they are sisters and it did not occur to the first defendant to obtain receipts from her own sister. Likewise, I am certain that the second defendant was also of the same mind and I am not surprised that they could only produce three receipts, two of which were dated after June 2005 and one dated 10 September 2003. Be that as it may the onus of proof that it was she and not the second and third defendant's who had maintained Jordan must fall squarely on the first defendant's shoulders and I find that this onus had not been discharged.

[45] For the first defendant, it was also argued by learned counsel that Jordan had at all material times up to June 2005, been in the custody, care and control of the first defendant. Whilst it may be true that the plaintiff had visited the first defendant and Jordan many times in Malaysia, I have no doubt in my mind that he did not have actual knowledge pertaining to custody, care and control of Jordan at the material time. No doubt that Jordan was always with the first defendant when plaintiff came to visit but that fact alone did not prove that custody, care

and control is with her. The same goes for the submission that the first defendant had taken Jordan for a holiday to Europe or to visit the plaintiff in Manila. I do not believe that the second and third defendant would stop her from taking Jordan for the visits, bearing in mind that the first defendant is her sister and the mother of Jordan. In my opinion, these facts alone do not prove that the first defendant had custody, care and control over Jordan.

[46] For the reasons which I have just stated, I am of the view that Jordan had been in the custody, had been brought up, maintained and educated by the second and third defendants and in that respect, they had fulfilled the requirements of s. 6.

[47] One other ground that was taken up in respect of s. 6 concerns the registrar's power to dispense with the consent of any parent or custodian of the child. In the present case learned counsels for both the plaintiff and the first defendant had submitted that it was not "just and equitable and for the welfare of the child" that he should dispense with the consent of the first defendant or Bart who had been named as the father of Jordan. I am, however, unable to agree with this submission. I do not think that the powers of the registrar go beyond what is signified by the first defendant in the statutory declaration. In other words, the registrar, at the time of the application is duty bound to accept the statutory declaration and if the contents of that statutory declaration are later found to be falsified, the registrar's remedy is to bring an action for giving false information. This is evident from the provisions of sub-s. 8(1) of Act 253:

8. Parties and witness bound to speak the truth

(1) Every person who gives evidence before the Registrar shall be bound to state the truth and to answer thruthfully all questions which the Registrar may put to him.

[48] In this case the person signifying her consent in the statutory declaration had declared that she is the mother of Jordan. This information must also have matched the information in Jordan's birth certificate and, therefore, what reason can the registrar have for refusing the application? Especially when the would be adoptive mother is the sister of the child's natural mother. It is certainly not the duty of the registrar to ascertain whether the statutory declaration had been genuinely obtained or otherwise. To require him to do so would, in my opinion, put

upon him an onerous task which is not required by the law for him to fulfill. In the circumstances, I hold that this argument must also fail.

[49] For the reasons which I have given, I have allowed in respect of encl. 1, prayers (a) and (b) and dismissed prayers (c), (d), (e), (f) and (g). Likewise, prayers 1, 2, 3, 4, 5 and 6 in encl. 29 are also dismissed. Prayers (h), (i) and (j) in encl. 1 and prayer 7 in encl. 29 are also dismissed for obvious reasons. There is no order as to costs.